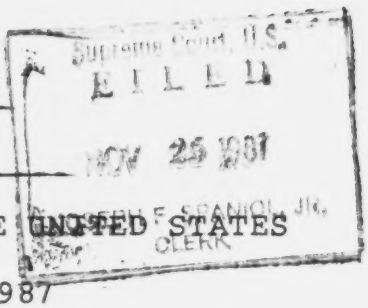
EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

87-951



No. _____

_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

_____

CURT DOUGLAS ABBOTT, Petitioner

v.

STATE OF INDIANA, Respondent

_____

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

_____

TERRANCE L. SMITH
4320 Fir Street, Ste. 411
East Chicago, IN 46312
(219) 398-3900
Counsel of Record

Of Counsel:
MICHAEL W. BOSCH & JOSEPH BANASIAK
7150 Indianapolis Boulevard
Hammond, IN 46324
(219) 844-3020

November 23, 1987

QUESTIONS PRESENTED

1. Was the Defendant denied his right to a fair trial, as guaranteed by the Due Process Clause of the Fourteenth Amendment and was the Defendant denied his Sixth Amendment right to a jury trial when the trial court incorrectly failed to include two of the Defendant's proposed jury instructions.

2. Was the Defendant denied his Sixth Amendment right to counsel when said Defendant was questioned by the police following an admonition by the Defendant's attorney not to question the Defendant.

TABLE OF CONTENTS

Title	Page
QUESTIONS PRESENTED.	i
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE.	3
REASONS FOR GRANTING THE WRIT.	13
I. The Defendant was denied his right to a fair trial, as guaranteed by the Due Process Clause of the Fourteenth Amendment and was denied his Sixth Amendment right to a jury trial when the trial court incorrectly failed to include two of the Defendant's proposed jury instructions	10
II. The Defendant was denied his Sixth Amendment right to counsel when said Defendant was questioned by the police following an admonition by the Defendant's attorney not to question the Defendant	48
CONCLUSION	52
APPENDIX	1a

TABLE OF AUTHORITIES

Cases — Page

Bernard v. State, (Ind. App. 1977)
367 NE 2d 20 15

Black's Law Dictionary, 1400
(4th. Ed. 1968). 39

Brewer v. Williams,
430 U.S. 385 (1977). 48-50

Carter v. Kentucky,
450 U.S. 288 (1981). 45

Cox v. State, (Ind. 1985)
475 NE 2d 664, 669 42

Curry v. State, (Ind. 1983)
453 NE 2d 1006 17-19,26-29

Davis v. State, (1976) 265 Ind 476,
478-479, 355 NE 2d 836, 838. 19

Dudley v. State, (Ind. 1985)
480 NE 2d 881, 903. 37,38

Duncan v. Louisiana,
391 U.S. 145 (1968). 45,47

Escobedo v. Illinois,
378 U.S. 478 (1964) 48-50

Fisher v. State, (Ind. 1973)
294 NE 2d 632, 634. 26

Harrington v. State, (Ind. App. 1980)
413 NE 2d 622, 624. 15,22

Harris v. State, (1900) 155 Ind. 265,
58 NE 75. 15

Priestley v. State, (Ind. App. 1983)
451 NE 2d 88. 37,38

Rodriguez v. State, (Ind. App. 1979)
385 NE 2d 1208, 1211. 14

Sanders v. State, (Ind. 1984)
466 NE 2d 424, 428. 27

Sims v. State, (Ind. App. 1985)
482 NE 2d 1182, 1185. 42

Sureeporn Roll. v. State,
(Ind. App. 1985), 473 NE 2d 161 . . 18,19

Tanner v. State, (Ind. 1984)
471 NE 2d 665, 666-668. 32-34

Taylor v. Kentucky, 436 U.S. 479
436 U.S. 479 (1978) 43-45

Thomas v. State, (Ind. App. 1975)
330 NE 2d 325, 327. 14

Warren v. State, (Ind. 1984)
470 NE 2d 342, 344. . . 15,22-24,26-28,32

Miscellaneous:

United States Constitution,
5th Amendment 45

United States Constitution,
6th Amendment . . . 11-13, 42,45-48,50,52

United States Constitution,
14th Amendment. 13, 42-43,46,52

Indiana Code Annotated, 35-37-2-2
(West 1986). 14

Indiana Code Annotated, 35-43-4-2.5
(West 1986). 20

Indiana Code Annotated, 35-41-3-7
(West 1986). 18,25

Indiana Judges Association,
Indiana Pattern Jury Instruction,
(Criminal) (1980). 16,30

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

CURT DOUGLAS ABBOTT, Petitioner

v.

STATE OF INDIANA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

The Petitioner, Curt Douglas Abbott, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Indiana Court of Appeals, entered in the above entitled proceeding on February 19, 1987.

OPINIONS BELOW

The memorandum decision of the Indiana Court of Appeals has not been reported. It is reprinted in the appendix hereto, p. 1a, infra. The Indiana Supreme Court, without issuing an opinion, denied transfer of said case.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Indiana Court of Appeals is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 14, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment 6:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crimes shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature

and cause of the accusation; to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The Defendant/Appellant, Curt Douglas Abbott, is the owner of Abbott Auto Sales, a used car dealership. [T.R. 238-239]. During any given year, Curt Abbott deals in 250 to 300 cars. [T.R. 240]. Due to the nature of the used car business, Abbott buys cars from a variety of sources. [T.R. 239]. While Abbott purchased most of the cars at auto auctions and from dealers, he did purchase some cars from private parties. [T.R. 239]. On several prior occasions, Abbott had dealt with an individual named Mickey Jones. [T.R. 241]. Jones, who is also a used car dealer, became acquainted with Abbott at auto auctions and sales. [T.R. 240]. During the month of September, 1985, Abbott agreed to purchase a 1981 Chevrolet from Jones. [T.R. 241-242].

Jones was to deliver this car to Abbott on September 17, 1985, and he did in fact do so. [T.R. 243].

On September 17, 1985, two vehicles pulled up to Abbott's house, located at 1435 Greenwood Avenue, Dyer, Indiana [T.R. 179]. One vehicle was a Ford Thunderbird driven by Mickey Jones. [T.R. 179-180]. The other vehicle was a Chevrolet being driving by a Curtis Duncan. [T.R. 179-180], This Chevrolet was in fact stolen [T.R. 179-180]. After the vehicles arrived at Abbott's house, Mickey Jones came to the door of the house and spoke to someone [T.R. 179]. Jones then motioned to Duncan to drive the car around back. [T.R. 179-180]. Approximately ten minutes after the car was driven around back, Jones, Duncan and Abbott were arrested by several police units which were following Jones and Duncan. [T.R. 181].

The car that was stolen was a 1983 Chevrolet Impala. [T.R. 169]. It was stolen from a John Goulding on September 16, 1985, in

Chicago, Illinois. [T.R. 170]. The Cook County Sheriff's Police found the car the next morning on 155th Street in Calumet City, Illinois. [T.R. 176]. Although nothing in the record shows how or who moved the car from Chicago to Calumet City, the record shows that the car was in the possession of Mickey Jones and Curtis Duncan on the morning of September 17, 1985. [T.R. 176-180]. Approximately 3:00 - 3:30 in the afternoon on September 17, 1985, a group of individuals in three cars, including the stolen 1983 Chevrolet Impala, left the 155th Street residence. [T.R. 177]. After a short time, one of the cars left the group, leaving Jones driving the Thunderbird and Duncan driving the stolen Chevrolet. [T.R. 178-180]. Those two vehicles then continued on to the Abbott residence. [T.R. 179].

Following the arrival of Jones and Duncan, six to eight police cars pulled up to the Abbott residence. [T.R. 151]. The officers then exited the cars and arrested Abbott, Jones and Duncan. [T.R. 243, 252].

These officers then, with their guns drawn, began to search the grounds around Abbott's house. [T.R. 253]. Abbott's wife, Allison Abbott, then came out of the house and asked one of the police officers what was happening. [T.R. 252]. An officer responded that Curt Abbott was under arrest for receiving a stolen car. [T.R. 252]. After hearing this, Allison Abbott then returned to her house and telephoned the family attorney, Michael W. Bosch. [T.R. 253]. Curt Abbott was then brought back into the house to speak to attorney Bosch. [T.R. 254]. After talking with attorney Bosch, Abbott then handed the phone to a policeman who began to talk to attorney Bosch. [T.R. 255]. The police were then informed by attorney Bosch and the Defendant, that the Defendant would not sign a consent to search. [T.R. 128]. Additionally, attorney Bosch informed the Defendant not to make any statements to the police officers.

Shortly after the telephone conversation with attorney Bosch, Abbott was transported by

Sgt. Copelin of the Dyer Police Department to the Dyer Police Station. [T.R. 243]. On the way to the police station, Abbott and Copelin had a conversation. [T.R. 244]. Abbott asked Sgt. Copelin what was going to happen to him. [T.R. 245]. Sgt. Copelin responded that he did not know for sure what was going to happen to Abbott. [T.R. 246]. Abbott also told Sgt. Copelin that he was not involved in any syndicate auto theft operations and that he did not know he was purchasing a stolen car. [T.R. 244-245]. Abbott also stated that while he told Sgt. Copelin that he now realized the car he was going to purchase was a stolen car, he did not come to this realization until he was handcuffed and surrounded by then police officers of the various police departments. [T.R. 258].

Because of the similarity between the 1981 and 1983 models of the Chevrolet Impala, Abbott stated at trial that he thought the car he was receiving on September 17th, was in fact a 1981 Chevrolet Impala. [T.R. 259-260].

Abbott also stated at trial that even though the car had a broken window and a broken steering column, that did not mean that the car was stolen because it was possible that it could have been a repossessed vehicle. [T.R. 257]. Additionally, Abbott testified at trial that he also was not expecting to receive a title on that day and that he expected one within two weeks of the date of sale [T.R. 257-258]. Furthermore, Abbott stated at trial that he did not think the $1,800.00 price on the car was so low as to indicate that it was stolen. [T.R. 260]. Abbott elaborated on this by stating that he thought he was getting a 1981 car and that $1,800.00 is a reasonable wholesale price for a 1981 model, especially if the car has some damage. [T.R. 260].

Sgt. Copelin gave a somewhat different version of the facts. [T.R. 193-222]. Abbott and Sgt. Copelin are in agreement that a conversation took place between them on the way to the Dyer Police Station. [T.R. 198-244]. Sgt. Copelin stated that Abbott was

pleading that this was the first time he was ever involved in anything to do with a stolen car. [T.R. 198]. Additionally, according to Sgt. Copelin, Abbott was concerned about what would happen to him and his family. [T.R. 198-199]. After arriving at the police station, Sgt. Copelin claimed that Abbott made another statement similar to the one he made on the way to the police station. [T.R. 200]. In addition, Sgt. Copelin said that Abbott made statements indicating that he knew the car was stolen when he purchased it. [T.R. 200]. The only evidence of such conversations was the testimony of Abbott and Sgt. Copelin as Abbott refused to make a written statement. [T.R.201].

Following the presentation of all of the evidence, the trial court heard arguments on objections to the final jury instructions. [T.R. 278]. Defense counsel's objections were all overruled. [T.R. 278-282]. Defense counsel argued that Indiana Pattern Jury Instruction 10.13 should have been included as

it was his contention that ample evidence of a mistake of fact was introduced at trial. [T.R. 287]. Additionally, defense counsel argued that the trial court committed error in not including Indiana Pattern Jury Instruction 12.03, regarding confessions. [T.R. 288]. In support of his argument, defense counsel stated that the Court's instruction on admissions, basically took the decision away from the jury as to whether or not an admission had in fact been made by the Defendant. [T.R. 280, 288].

As a result of this conviction, the Defendant filed an appeal to the Indiana Court of Appeals. Said appeal was filed on October 3, 1986, and thereafter denied on February 19, 1987. Following the denial of said appeal, the Defendant then filed a Petition for Re-Hearing with the Indiana Court of Appeals and said petition was denied on March 30, 1987. Thereafter, the Defendant filed a Petition to Transfer to the Indiana Supreme

Court. Said petition was filed on April 17, 1987, and thereafter denied without opinion, on September 24, 1987.

Throughout the trial and State Court appeal process, issues were in fact raised to the various courts about the Defendant's lack of a fair trial due to the exclusion of the Defendant's proposed jury instructions. While the particular United States Constitutional provisions were not specifically cited, the error was in fact preserved throughout the process by raising the principles behind those Constitutional provisions. The Sixth Amendment right to counsel issue was raised in a pre-trial motion to suppress at the trial court level. [T.R. 121]. Said motion to suppress was denied. The issue was not raised directly on appeal but, it is sufficiently intertwined with the jury instruction issue so as to merit review by this Court. Because the statement given prompted the Defendant to propose the jury

instruction in question, the Sixth Amendment right to counsel issue should be addressed by this Court as a collateral issue.

REASONS FOR GRANTING THE WRIT

I

THE DEFENDANT WAS DENIED HIS RIGHT TO A FAIR TRIAL, AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A JURY TRIAL WHEN THE TRIAL COURT INCORRECTLY FAILED TO INCLUDE TWO OF THE DEFENDANT'S PROPOSED JURY INSTRUCTIONS.

The Indiana Court of Appeals did commit error in failing to hold that the trial court failed to properly instruct the jury in the Defendant's original jury trial. As a result thereof, the Defendant was denied his right to a fair trial as required by the Due Process Clause of the Fourteenth Amendment and did in fact have his Sixth Amendment right to a jury trial infringed upon. In order to establish the error of the Indiana courts and therefore demonstrate why the Writ should be granted, it will first be necessary to conduct a detailed review of some of the relevant Indiana law in this matter. By doing so, it will then be

clear that the Defendant's Constitutional rights were violated. Following this discussion of Indiana law, the petition will then address some decisions of this Court which support the Defendant's position. In conclusion, the petition will address other reasons for granting the Writ.

A trial court has a statutory duty to instruct a jury on all matters of law which are necessary for their information in order to determine a verdict. Ind. Code Ann. 35-37-2-2 (West 1986); Rodriguez v. State, (Ind. App. 1979), 385 NE 2d 1208, 1211; Thomas v. State, (Ind. App. 1975), 330 NE 2d 325, 327.

> "It is the duty of the trial court to correctly and completely present the applicable law to the jury so that it will not be mislead, can adequately understand the case, and arrive at a fair and correct verdict." Rodriguez @1211.

The question is thus, what is necessary for a jury to arrive at a fair and correct verdict in a particular case. The general rule on

jury instructions in Indiana is that if there is any evidence to support a jury instruction, that instruction is properly given even if there is an objection that the instruction is not applicable to the evidence. Bernard v. State, (Ind. App. 1977), 367 NE 2d 20; Harris v. State, (1900), 155 Ind. 265, 58 NE 75.

This general rule, as to jury instructions, has been applied in a more specific form in several areas of Indiana law. In the area of defenses to crimes, a defendant is entitled to an instruction on any defense which has some foundation on the evidence. Warren v. State, (Ind. 1984) 470 NE 2d 342, 344; Harrington v. State, (Ind. App. 1980) 413 NE 2d 622, 624. Furthermore, the defendant is entitled to this instruction even if the evidence supporting the instruction is weak and inconsistent. Harrington @624.

In the case at bar, the defendant requested that the jury be instructed on the defense of mistake of fact. [T.R. 287]. The particular instruction the defendant

requested, was Indiana Pattern Jury Instruction 10.13 [T.R. 287]. Indiana Pattern Jury Instruction 10.13 reads as follows:

> "The defense of mistake of fact is defined by law as follows: It is a defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for the commission of the offense. The reasonable mistake about a fact must have prevented the defendant from, forming the intent to commit the offense of which he is charged or knowing that the offense charged was being committed or being reckless, (as defined by law), in his conduct. The State has the burden of disproving this defense beyond a reasonable doubt." Indiana Judge's Association, Indiana Pattern Jury Instructions (Criminal) (1980).

Judge Letsinger refused the Defendant's request to include Indiana Pattern Jury Instruction 10.13 in the court's instructions to the jury, in spite of the defense counsel's objection.

> "The defendant objects and contends the court erred by not offering Indiana Pattern Instruction 10.13, which is an instruction regarding mistake of fact, and that there was

> more than ample evidence produced at the trial to show that the defendant believed that he was buying a car in a bona fide business transaction, and that mistake of fact would go to effect culpability. [T.R. 288].

An examination of the court's instructions also shows that the issue of mistake of fact was not covered by any other instruction. [T.R. 87-106].

Indiana does have case law regarding when it is proper to include an instruction on mistake of fact. Curry v. State, (Ind. 1983), 453 NE 2d 1006. In order to have a mistake of fact instruction properly included in the court's final instructions, a defendant must either specifically plead the defense or introduce evidence on it in trial. Curry @1008. The defendant in Curry failed to either specifically plead the defense of mistake of fact or introduce any evidence at trial of a mistake of fact. Id. Therefore, the Indiana Supreme Court in Curry stated that the trial court in Curry was correct in

refusing the defendant's tendered instruction on mistake of fact. Id. @1008-1009.

Before analyzing Abbott's fact situation in light of Curry v. State, it would be best to briefly outline Indiana law on the mistake of fact defense. Indiana has a statute on the mistake of fact defense, which is found at Indiana Code Ann. Section 35-41-3-7 (West 1986). It reads as follows:

> "It is a defense that the person who engaged in a prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for commission of the offense." Indiana Code Ann.Section 35-41-3-7 (West 1986).

The statute is fairly clear and relatively easy to apply to a given set of facts. Indiana case law does provide some guidance for courts for the statute's application. The case of Sureeporn Roll v. State, (Ind. App. 1985) 473 NE 2d 161, discusses the availability of the mistake of fact defense in Indiana.

> "It is available as a defense where the defendant, acting under a reasonable and honest mistake concerning a fact or facts; commits an act which, if the facts were as the defendant believed them to be, would not be criminal". Id. SEE also, Davis v. State, (1976) 265 Ind. 476, 478-479, 355 NE 2d 836, 838.

This excerpt from Sureeporn Roll will help determine whether or not Abbott introduced the proper evidence to establish the mistake of fact defense.

Contrary to what happened at the trial court level in the case of Curry v. State, there was substantial evidence of a mistake of fact that was introduced at Curt Abbott's trial. A jury, if properly instructed, could have found that Abbott acted under a reasonable and honest mistake, within the meaning of Sureeporn Roll v. State, concerning certain facts having to do with the purchase of the car in question. In turn, the jury then could have found Abbott innocent of the charged crime as the mistake of fact would have negated the requisite culpability.

Abbott thus, would not have knowingly or intentionally exerted unauthorized control over the motor vehicle of another person with the intent to deprive that person of ownership within the meaning of Indiana Code Ann. Section 35-43-4-2.5 (West 1986).

An analysis of Abbott's trial testimony alone, shows a great deal of evidence of a mistake of fact. While Abbott received a 1983 Chevrolet Impala, he was expecting a 1981 Chevrolet Impala. [T.R. 242]. When Duncan and Jones arrived with the car, Abbott in fact thought that the car was a 1981 model. [T.R. 260]. Abbott introduced photographs of a 1981 and a 1983 Chevrolet Impala. [T.R. 260-263]. An examination of these exhibits shows the striking similarity between the two model years. Therefore, even after a brief inspection of the car, Abbott could have been reasonably mistaken as to the year of the car.

Abbott testified that he was to pay $1,800.00 for the 1981 Chevrolet Impala. [T.R. 260]. He further testified that $1,800.00 was

a reasonable wholesale price for that car, especially with the damage it had. [T.R. 260]. The damage he spoke of was a broken steering column and a broken window. [T.R. 257]. Abbott testified that he knew of the damage before he agreed to purchase the car. [T.R. 257]. Abbott further testified that this damage does not necessarily indicate that the vehicle was a stolen vehicle. [T.R. 257]. Repossessed cars are often purchased in the same condition. [T.R. 257]. In fact, Abbott testified that he had purchased cars in similar condition from General Motors Acceptance Corporation. [T.R. 257]. John Van Amstel, another used car dealer, supported Abbott's testimony. [T.R. 229]. Van Amstel stated that repossessed cars are in fact bought and sold with broken steering columns and broken windows. [T.R. 229].

The State questioned Abbott about the fact that he did not receive a title from Jones on the day of the sale. [T.R. 266]. On direct examination, Abbott stated that he was

not expecting one on that date but rather, was expecting one in the future. [T.R. 257]. Abbott testified that this also was not unusual in the used car business. [T.R. 257-258]. According to business practices, the seller has two weeks to supply a title. [T.R. 257-258].

Based on the evidence presented by Abbott at trial, Abbott was entitled to an instruction on a mistake of fact defense. According to Warren v. State, 470 NE 2d @344 and Harrington v. State, 413 NE 2d @624, a defendant is entitled to an instruction on any defense which has some foundation on the evidence. Harrington v. State goes even further requiring the instruction even if the evidence supporting that instruction is weak and inconsistent. Id. @624. That was not the case with Abbott's evidence. In Abbott's case, the evidence was both strong and consistent that there was a mistake of fact. The trial court was therefore in error in failing to instruct the jury on the mistake of

fact defense.

The Indiana Court of Appeals, relied on a portion of the Warren v. State case to support the trial court's holding on the mistake of fact defense instruction. Specifically, the Court of Appeals held:

> "However, the Supreme Court in Warren also determined that it was not reversible error for the trial court to refuse a tendered instruction when the subject matter of the instruction is covered by other instructions given by the court. 470 NE 2d 344. In Warren, the trial court properly charged the jury with all of the elements for each crime involved, including a lack of consent element. 470 NE 2d 344. Therefore, no error was found in the trial court's refusal to give a tendered instruction, specifically on lack of consent. 470 NE 2d 344. This Warren rationale controls the outcome of Abbott's allegation of error because the trial court here properly charged the jury with all of the elements of the crime of theft in its final Instruction No. 2. These elements include the requirements that Abbott acted "knowingly or intentionally" and "with intent to deprive" the rightful owner of the automobile's use. This instruction covers the subject matter of the mistake of fact defense, because it is clear from the instruction given that Abbott could not have

> acted with the requisite knowledge or intent in order to be convicted of theft if he mistakenly believed the automobile was not stolen."

This particular holding in Warren v. State cannot be properly applied to the case at bar in order to justify the trial court's refusal to instruct on the mistake of fact defense.

Warren can be easily distinguished from the case at bar. In Warren, the defendant was charged with rape, criminal deviate conduct and criminal confinement. Id@343. Conversely, Abbott was charged with theft. The defendant in Warren tried to rely on a consent defense in regards to all three charges. However, the consent defense was not a separate statutory defense. In support of an instruction on the defense of consent, the defendant in Warren argued that his testimony could serve as a basis for this instruction. Id.@344. This Court agreed with the defendant in Warren about the general principal of a defendant being entitled to an instruction on any defense which has a foundation in the

evidence. Id.@344. Despite this fact, this Court held that the issue of consent was already covered in the elements of the individual crimes and those elements were already covered in the instructions on those other crimes. Id.

In Indiana, the mistake of fact defense is a separate statutory defense. I.C. 35-41-3-7 (West 1986). Therefore, the mistake of fact defense is separate and apart from the various statutes defining crimes in Indiana. Because of this separate status, the use of the mistake of fact defense must be governed by case law and rules that relate specifically to the mistake of fact defense of other statutory defenses.

This Court has in fact addressed the requirements for use of the mistake of fact defense instruction. Curry v. State, (Ind. 1983) 453 NE 2d 1006. As mentioned previously, in order to have a mistake of fact instruction properly included in the court's final instructions, a defendant must either

specifically plead the defense or introduce evidence on it in trial. Curry @1008. There is thus a conflict in this Court's decisions on instructions on defenses. On one hand, in Warren v State, this Court holds that a defendant is not entitled to an instruction on a defense if the elements instruction of the crime encompasses the theory of the defense issue. Id@344. On the other hand, this Court, in Curry v. State, holds that a defendant is entitled to an instruction on the mistake of fact defense as long as the defendant specifically pleads the defense or introduces evidence on it. Curry @1008.

If there are cases on point interpreting a given statute, courts must look to them for guidance in interpreting the statutes. Fisher v. State, (Ind. 1973), 294 NE 2d 632, 634. If not, courts must look to the statutes themselves for guidance and interpret them by using the plain meaning of their words and phrases. Id. In analyzing the case at bar in light of Fisher, this Court must look to Curry

v. State rather than Warren v. State, as Curry directly interprets the mistake of fact defense statute. It can be argued, that both Curry and Warren interpret the general rule on defenses to crimes. To resolve this dilemma, it would be best to look to analogous rules on statutory construction. The general rule on statutory construction reads as follow:

> "...when one statute deals with the subject in general terms and another statute, pertaining to the same subject, deals in a more detailed and specific manner, then the two should be harmonized if possible. If the two statutes present an irreconcilable conflict, however, then the more detailed statute will prevail over the less detailed statute pertaining to the same subject matter." Sanders v. State, (Ind. 1984), 466 NE 2d 424, 428.

Therefore, applying this statutory construction rule to case law, this Court should use the Curry case, which is the more specific case, to determine whether or not Abbott was entitled to the mistake of fact defense instruction.

Upon closer examination, the Curry case

has even more similarities to the case at bar. In both cases, the respective defendants were charged with theft. Curry @1007. Therefore, it cannot be logically argued that Warren v. State, a rape case not involving the mistake of fact defense, be used as a precedent for the case at bar, instead of Curry v. State, which is a theft case using the mistake of fact defense. It is apparent that the legislature made special provision for this defense, which was to be used in addition to the criminal statutes outlining the elements of the various crimes. Technically, cases such as Warren v. State, could be used to completely eliminate this defense, as all crime statutes have built in culpability requirements. Thus, if the Warren case was used as precedent in the case at bar, it would render the mistake of defense statute useless, thereby circumventing the legislative intent of the Indiana State Legislature.

In applying the rule in Curry v. State to the case at bar, it is apparent that the

mistake of fact defense instruction should have been given in Abbott's trial. Curry requires that the mistake of fact defense must either be plead by or introduced into evidence by the defendant. Id.@1008. The defendant, Curt Douglas Abbott, introduced a great deal of evidence at trial on the mistake of fact defense issue. SEE [T.R. 226-275]. According to Curry v. State then, the appropriate precedent for the case at bar, Abbott met the requirements for the inclusion of the mistake of fact defense instruction. Id. The failure of the trial court to include such an instruction removed the mistake of fact issue from the province of the jury.

In the case at bar, the defendant also objected to the court's instruction number eleven, which reads as follows:

> "There has been introduced in evidence in this cause, an oral statement which purports to be the voluntary admission of the defendant. An admission of guilt, if made voluntarily by the defendant and without any promises or inducements is

> competent evidence against him. The State must satisfy you by proof beyond a reasonable doubt that the admission was voluntary. Admissions obtained by promises, inducements or duress, threats, violence and threats of future violence cannot be considered voluntary, and if you find from the evidence in this cause that the purported admission of the accused was obtained by abuse, threats, duress, violence, promises or inducements, then such admission was not voluntary, and cannot be considered by you as evidence against the defendant. [T.R. 97].

The Defendant requested that the court also include Indiana Pattern Jury Instruction 12.03 which reads as follows:

> "You have before you evidence that the defendant confessed that he committed the crime charged in the information. IT IS FOR YOU TO DETERMINE WHETHER THE DEFENDANT CONFESSED, (emphasis added), and, if so, what weight should be given to the confession. In determining the weight to be given to a confession, you should consider all of the circumstances under which it was made." Indiana Judges Association, Indiana Pattern Jury Instructions (Criminal) (1980).

Defense counsel did make a record of his objection.

> "I also object to the court's instruction on admissions without also submitting the pattern instruction on confessions. There is no language in this particular instruction and I object. Instruction on confession, there is no language that says its up to the jury to determine whether or not an admission has been made, and its up to the jury to determine whether or not a confession has been made. I think those are clearly at issue in this case." [T.R. 280].

Judge Letsinger overruled the Defendant's objection. [T.R. 280]. Defense counsel again renewed his objection after the jury retired.

> "The Defendant also objects to the court's failure to read to the jury Indiana Pattern Instruction 12.03, which is regarding confessions. There is more purported confession than an admission in the evidence here, and by offering the instruction solely regarding admission, the court did not adequately cover the aspect that the jury may decide whether a confession or admission was made or not." [T.R. 288-289].

In addressing this issue, the Indiana

Court of Appeals, agreed with the trial court. Specifically, the Indiana Court of Appeals held as follows:

> "The trial court's instruction regarding a "purported" admission properly leaves the question of fact as to whether the admission existed to the jury. This instruction, coupled with final Instruction No. 10 informing the jury that it was the exclusive judge of the evidence and the credibility of the witnesses, covered the same subject matter as Abbott's tendered instruction. The trial court thus committed no error in refusing Abbott's tendered instruction. SEE Warren, supra."

By ruling in this fashion, the Indiana Court of Appeals failed to consider ruling Indiana Supreme Court case law on confessions/admissions.

In Tanner v. State, (Ind. 1984) 471 NE 2d 665, this Court has outlined the proper method of instructing a jury on a confession issue. The defendant in Tanner was convicted of murder. Id. @666. Evidence was presented by the State that the defendant had made a

confession. Id. @666-668. The defendant admits to making the statement but, disputed the fact that it was a confession. Id. @668. At the conclusion of the trial, the jury was given the following instruction relating to confessions:

> "You have before you evidence that the defendant confessed that he committed the charge in the information. It is for you to determine whether the defendant confessed and, if so, what weight should be given to the confession. In determining the weight to be given to a confession, you should consider all of the circumstances under which it was made."

On appeal, the defendant in Tanner argued that: "The instruction is mandatory in nature and thus the instruction invades the province of the jury." Id. @668. The Indiana Supreme Court disagreed. "The instruction does not presume a confession but states it is for the jury to determine whether the appellant confessed. The instruction was proper, given the nature of the evidence before the jury."

Id.

Curt Abbott is making essentially the same argument in the case at bar as the defendant in Tanner made on his appeal. There is a key difference though. In Abbott's case the instruction presumed an admission while in Tanner, the instruction left it up to the jury to determine whether or not it was in fact an admission. Abbott's instruction was in fact mandatory in nature and it thus, invaded the province of the jury. Had Abbott received the instruction that the defendant in Tanner received, it would have been possible for the jury to determine that an admission had not been made. Instead, the jury in Abbott's trial was forced to find that an admission existed and therefore, the jury was virtually foreclosed from finding Abbott not guilty.

The admission of the court spoke of, in the instruction, was at best questionable. Sgt. Copelin of the Dyer Police Department, was the person who testified as to such admission.

> "He did indicate and made statements indicating that he knew the vehicle was stolen; however, this was his first and only time." [T.R. 200]. "I don't remember exactly how he worded the statement. He did indicate that he knew or believed the vehicle was stolen." [T.R. 205].

This was the only evidence of an admission as Abbott did not give a written statement. [T.R. 200]. Based on Sgt. Copelin's testimony on direct examination, there is a serious question as to whether an admission had been made by Abbott. On cross-examination, defense counsel asked Sgt. Copelin about this admission. [T.R. 221]. Copelin then testified that the admission was more or less an interpretation of statements made by Abbott to him. [T.R. 221]. Thus, Sgt. Copelin's testimony left quite a large doubt as to whether or not an admission had been made.

Curt Abbott, testifying in his own defense, left even more of a doubt that an admission was made. He denied ever making such an admission. [T.R. 249]. Abbott did

admit telling Sgt. Copelin that he knew the car was stolen but, that he only realized this after the police officers told him the car was stolen. [T.R. 249, 258].

> "Question by Mr. Bosch: But you did tell him that you bought other vehicles from Jones that weren't stolen, is that correct?
>
> Answer by Mr. Abbott: Right. I asked him what in the world's going on here because I still did not know what was going on. I knew then by that time, that there was--that the car was stolen and also--
>
> Question by Mr. Bosch: How did you know that?
>
> Answer by Mr. Abbott: Well, for one thing, there was about eight police officers there that was telling me it was stolen." [T.R. 249].

> "Question by Mr. Bosch: In any of the things you said to Sgt. Copelin, did you mean to tell him that you knew that the car was stolen when you got it and before you got it?
>
> Answer by Mr. Abbott: No. I had said, of course, now I know its stolen; It's obvious. I got handcuffs on me and ten police officers there counting Dyer." [T.R. 258].

Abbott had thus given consistent testimony that he did not know that the car was stolen at the time he purchased it. Furthermore, his testimony shows that Sgt. Copelin misinterpreted his remarks.

A jury instruction is proper only if there is some evidence of probative value to support it. Dudley v. State, (Ind. 1985), 480 NE 2d 881, 903; Priestley v. State, (Ind. App. 1983), 451 NE 2d 88. An examination of the prior paragraphs, shows that there was in fact evidence of probative value to support the defendant's proposed instruction on confessions. When comparing Abbott's testimony with Sgt. Copelin's testimony, it is obvious that the two versions can be reconciled. Both admit that something was said regarding the car being stolen. [T.R. 200, 205, 249, 258, 270]. Sgt. Copelin testified that the admission was more or less his interpretation of Abbott's statement. [T.R. 221]. Abbott testified that his

knowledge of the car being stolen came to be only after being arrested. Based on the combination of Abbott's and Sgt. Copelin's testimony, there was evidence of probative value, within the meaning of Dudley v. State and Priestley v. State, so as to require that the defendant's proposed instruction on confession be included in the court's final instructions.

Despite the unequivocal testimony of Abbott and the equivocal testimony of Sgt. Copelin, the Indiana Court of Appeals refused to find that the trial court erred in not including a defendant's proposed instruction on confessions. Memorandum Decision, page 4. The Indiana Court of Appeals held that the statement in question was more of an admission rather than a confession. Id. In support of this holding, the Indiana Court of Appeals said that this could not be a confession because a confession requires the admission of guilt of all the necessary elements of the charged crime. Id. For all intents and

purposes though, this so called "admission" would encompass all of the elements of the crime of theft. This admission/confession disagreement is in reality irrelevant. In any case, the jury had no opportunity to find that an admission/confession did not exist.

The Indiana Court of Appeals relies on the use of the word "purports" in the disputed instruction to justify the position that the jury in fact had room to decide whether an admission existed. Memorandum Decision, page 4. This reliance is erroneous. It would be best to once again reprint the disputed part of the instruction.

> "There has been introduced in evidence in this cause, an oral statement which purports to be the voluntary admission of the defendant."

The word "purports" the verb, as defined in Black's Law Dictionary, means:

> "To convey, imply, or profess outwardly; to have the appearance of being, intending, claiming, etc." Black's Law Dictionary, 1400 (4th ed. 1968)

From all appearances, the word "purports" is being used as a verb in the instruction in question. That use is not especially clear though, as the instruction in general is very confusing. Even if it is considered a verb, there is still a problem with the Court of Appeals holding that the instruction gives the jury discretion to determine whether or not an admission had been made. By stating that there is a "...an oral statement which purports to be the voluntary admission of the defendant" the trial court is using the word "purports" in conjunction with the word "voluntary." The only possible discretion the jury could have is in determining whether or not the "admission" was given voluntarily.

In examining the rest of the instruction, it is obvious that the instruction presupposes an admission. The only thing the instruction does not presuppose is the voluntariness question. Throughout the entire instruction, the jury is given the opportunity to discount

the admission if there was any type of promise, inducement, duress, threat, violence or threat of future violence. Abbott's statement was not the product of any of those actions. Instead, it was a product of questioning by a police officer following the instructions of the Defendant's attorney not to conduct any questioning. Furthermore, Abbott argucs that what he did say was not even an admission. An examination of his testimony and Sgt. Copelin's testimony, as previously outlined in this petition, will show the Court that there was at least some question of whether or not an admission or confession was given. This question though, was not a question that was given to the jury at Abbott's trial.

The exclusion, of the defendant's proposed instructions on mistake of fact and on the existence of a confession, had an effect on the jury verdict in Abbott's trial. A defendant's conviction must be reversed if the jurors decision MAY (emphasis added) have

been based on the erroneous instruction. Cox v. State, (Ind. 1985) 475 NE 2d 664, 669; Sims v. State, (Ind. App. 1985), 482 NE 1182, 1185. Ample proof of this has been shown in this section of the petition. Keeping in mind that the standard is "may", it is clear that Curt Abbott's conviction must be reversed, due to the trial court's errors with the instructions.

After reviewing the facts of the Defendant's case in conjunction with the Indiana law on jury instructions, it is clear that many of the key issues in this case were kept from the jury. The question thus is, whether or not any of the Defendant's Constitutional rights were violated by the exclusion of the Defendant's proposed jury instructions. The answer is clear, both the Defendant's Fourteenth Amendment Due Process Clause right to a fair trial and the Defendant's Sixth Amendment right to a jury trial were violated.

First, as to the fair trial issue, there

is United States Supreme Court case law that stands for the proposition that the failure to include a jury instruction may violate a defendants Fourteenth Amendment Due Process Clause right to a fair trial. Taylor v. Kentucky, 436 U.S. 479 (1978). In Taylor v. Kentucky this Court held as follows:

> "We hold that on the facts of this case the trial court's refusal to give petitioner's request an instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment." Id. @490.

While the types of jury instructions at issue in the case at bar were different than the presumption of innocence instruction in Taylor, the principle is still the same. In both cases, the jury was not sufficiently instructed so as to render a proper verdict.

This Court, in Taylor, also disputed some other arguments by the Commonwealth of Kentucky:

> "The Commonwealth also contends that no additional instructions were required, because defense counsel argued the presumption of innocence in both his opening and closing statements. But arguments of counsel cannot substitute for instructions by the Court." Id. @488-489.

It is clear from the above quotation that this Court places a great deal of importance in the proper use of jury instructions. Even though defense counsel in Taylor argued the presumption of innocence in both his opening and closing statements, it was still not enough to take the place of a jury instruction. Defense counsel in the case at bar also argued extensively about both the mistake of fact instruction and the confession/admission instruction. As in Taylor though, these arguments did not carry the force of a jury instruction. Furthermore, because of the mandatory nature of the confession/admission instruction, the jury was in effect foreclosed from finding in favor of the Defendant on that issue.

In the case of Carter v. Kentucky, 450 U.S. 288 (1981), the instruction at issue was the defendant's proposed instruction informing the jury that it must not draw inferences on the defendant's failure to testify. This Court held that the failure to include this instruction violated the defendant's right and privilege against self incrimination as protected by the Fifth and Fourteenth Amendments. Id. Once again, this Court emphasized the power of a jury instruction. Id @303. When the rulings in Taylor and Carter are compared to the case at bar, it is clear that the ruling of the Indiana Court of Appeals conflicts with settled precedent of this Court.

The Defendant also would argue that the failure to include the two proposed jury instructions was a violation of his Sixth Amendment right to a jury trial. In support of this proposition, this Court can look to the case of Duncan v. Louisiana, 391 U.S. 145 (1968). In the case of Duncan, this Court

first held that the Due Process Clause of the Fourteenth Amendment entitles a state court criminal defendant to a right to a jury trial as was previously guaranteed to defendants in federal court, through the Sixth Amendment. Id. The reasoning behind this decision was that there was a need to provide a jury for criminal defendants in state court in order to protect them from potential government oppression. Id. @155. This Court also emphasized that unlike in complicated civil cases, juries in criminal cases are very capable at determining facts in a given case and therefore returning a proper verdict. Id. @157.

When applying this Court's reasoning to the case at bar, it is fair to say that the jury in the case at bar could very well have decided upon all of the facts in the case. The trial court easily could have included the Defendant's two proposed jury instructions and thus, would have enabled the jury to come to a complete, informed verdict. By not

instructing the jury on those matters at issue, the trial court in effect removed the case from the jury and therefore infringed upon the Defendant's Sixth Amendment right to a jury trial.

While there is no United States Supreme Court case holding that a defendant's right to a jury trial can be infringed upon by the refusal to give a jury instruction, it is apparent that the failure to do so can infringe upon this right, provided for in the case of Duncan v. Louisiana. This Court should therefore review this issue because of the fact that it is an unresolved and important issue. This Court should rule that the denial of a jury instruction can, in fact, infringe upon this Sixth Amendment right to a jury trial. Furthermore, this Court should find that in the case at bar, the Defendant's Sixth Amendment right to a jury trial was in fact infringed upon by the denial of the Defendant's two proposed jury instructions.

II

THE DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL WHEN SAID DEFENDANT WAS QUESTIONED BY THE POLICE FOLLOWING AN ADMONITION BY THE DEFENDANT'S ATTORNEY NOT TO QUESTION THE DEFENDANT.

This issue is a collateral issue of the confession/admission jury instruction issue. As discussed throughout the first part of this Petition, it is apparent that the Defendant's proposed instruction should have been given. Compounding this position is the fact that the Defendant's statements should not have been admissable in the first place. Case law, from this Court, including Brewer v. Williams, 430 U.S. 385 (1977) and Escobedo v. Illinois, 378 U.S. 478 (1964), supports this proposition.

In the case of Escobedo v. Illinois, the defendant, after retaining an attorney, was denied an opportunity to communicate with his attorney. Id. The police officers continued

to interrogate Escobedo and throughout this interrogation, Escobedo told the police that he wished to speak to his attorney before saying anything to them. Id. Eventually, Escobedo eventually gave a statement which was used to convict him. Id. Furthermore, throughout this interrogation process, Escobedo's attorney was unsuccessfully trying to meet with him at the police station. Id. This Court, in an effort to curb such oppressive police behavior, struck down Escobedo's conviction. Id.

The case of Brewer v. Williams, is the famous "Christian Burial Speech Case." In Brewer, the defendant was arrested in Davenport, Iowa, for a crime convicted in Des Moines, Iowa. Id. The defendant retained attorneys in both Davenport and Des Moines and both attorneys advised Williams not to make any statements to the police officers. Id. Additionally, the police officers were also informed not to question Williams during the trip from Davenport to Des Moines. Id.

Despite these warnings, Williams was subtly interrogated by one of the officers when one of the officers asked where the alleged victim was and stated that the alleged victim deserved a Christian burial. Id. Williams, being a mental patient, then informed the police of the location of the body of the alleged victim. Id.

Williams was convicted of attempted murder based in part, upon the police finding the body after being given the location by Williams. This Court though, reversed the conviction finding that the defendant's right to counsel had been violated.

Both the Escobedo and Brewer cases support the Defendant's position in the case at bar that he was denied his Sixth Amendment right to counsel. Abbott was interrogated after the police were informed by Attorney Michael W. Bosch not to interrogate Abbott. Yet, the police did so and said statement was improperly introduced into evidence. Therefore, because of this fact, the

Defendant's conviction must be reversed because of the trial court's holding that is in conflict with this Court's holdings in both the Escobedo and Brewer cases.

CONCLUSION

For these various reasons, this Petition For Certiorari should be granted. The Defendant, Curt Douglas Abbott, was in fact denied his right to a fair trial, as guaranteed by the Due Process Clause of the Fourteenth Amendment, by the refusal of the trial court to include two of the Defendant's proposed jury instructions. In support of this proposition, the Defendant has cited case law from this Court. In addition, the Defendant has raised an undecided issue regarding whether or not the Sixth Amendment right to a jury trial requires that a trial court include proposed jury instructions when those instructions are proper. The Defendant has in fact demonstrated that the policy of the Sixth Amendment right to trial by jury would be best served by such a holding. Finally, the Defendant's Sixth Amendment right to counsel was violated when said Defendant

was questioned by the police following an admonition by the Defendant's attorney not to question the Defendant.

Respectfully submitted,

TERRANCE I. SMITH
4320 Fir Street, Ste. 411
East Chicago, IN 46312
(219) 398-3900
Counsel of Record

MICHAEL W. BOSCH & JOSEPH BANASIAK
7150 Indianapolis Boulevard
Hammond, IN 46324
(219) 844-3020
Of Counsel

November 23, 1987

APPENDIX

IN THE

COURT OF APPEALS OF INDIANA

THIRD DISTRICT

CURT DOUGLAS ABBOTT, Appellant (Defendant Below)	)	
v.	)	NO. 45A03-8609-CR-259
STATE OF INDIANA, Appellee (Plaintiff Below)	)	

APPEAL FROM THE LAKE SUPERIOR COURT
CRIMINAL DIVISION
HONORABLE JAMES E. LETSINGER, JUDGE
CAUSE NO. 2CR-148-985-593

MEMORANDUM DECISION

HOFFMAN, J.

Defendant-Appellant Curt Douglas Abbott appeals from a jury conviction of theft, a Class D felony. The facts most favorable to the verdict are as follows:

On the night of September 16, 1985, a 1983 Chevrolet Impala belonging to John Goulding was stolen from outside his home in Chicago, Illinois. After the Cook County Sheriff's Department located the automobile the next morning, a surveillance team was set up to watch and follow the automobile. The automobile was driven to the house of Curt Abbott in Dyer, Indiana. The surveillance team observed Micky Jones, the driver of the Impala, go into Abbott's residence, come out and wave to another man to drive the Impala around the house to the backyard. The backyard also served as a lot for a used car dealership owned by Abbott. During this transaction, Curt Abbott inspected the automobile and observed that the driver's

window had been broken out and the steering column "peeled" or broken so as to expose the ignition wires.

Abbott presents these five issues, as restated, for review:

(1) whether the trial court erred in refusing to instruct the jury with Indiana Pattern Instruction 10.13, regarding mistake of fact, as tendered by Abbott;

(2) whether the trial court erred in refusing to instruct the jury with Indiana Pattern Instruction 12.03, regarding the existence of a confession, as tendered by Abbott;

(3) whether the trial court erred in refusing Abbott's tendered instruction regarding his prior conviction;

(4) whether the trial court erred in overruling Abbott's motion in limine requesting an order that no mention be made of Abbott's previous misdemeanor conviction for theft; and

(5) whether there was sufficient evidence presented at trial to sustain Abbott's conviction.

Abbott's first allegation of error focuses on the trial court's refusal to read to the jury Indiana Pattern Instruction 10.13,

regarding the defense of mistake of fact, which was tendered by defense counsel at trial. In support of his allegation of error, Abbott cites this Court to Warren v. State, (1984), Ind., 470 NE 2d 342, 344, where the Supreme Court of Indiana stated the general principle that a criminal defendant is entitled to an instruction on any defense which has some foundation on the evidence. Testimony at trial by Abbott and another used car dealer as to the general practice of purchasing repossessed automobiles in essentially the same condition as the stolen Impala, coupled with Abbott's testimony that he had in the past bought two legitimately procured automobiles from Micky Jones, was ample evidence to support an instruction on a mistake of fact defense. Also, this Court has acknowledged that the Indiana Pattern Jury Instruction has received the tacit approval of our Supreme Court. See, Hobbs v. Tierney (1986), Ind. App., 495 NE 2d 217, 220, trans. denied.

However, the Supreme Court in Warren also determined that it was not reversible error for the trial court to refuse a tendered instruction when the subject matter of the instruction is covered by other instructions given by the court. 470 NE 2d at 344. In Warren, the trial court properly charged the jury with all of the elements for each crime involved, including a lack of consent element. 470 NE 2d at 344. Therefore no error was found in the trial court's refusal to give a tendered instruction specifically on lack of consent. 470 NE 2d 344. This Warren rationale controls the outcome of Abbott's allegation of error because the trial court here properly charged the jury with all of the elements of the crime of theft in its final Instruction No. 2. These elements include the requirements that Abbott acted "knowingly or intentionally" and "with intent to deprive" the rightful owner of the automobile's use. This instruction covers the subject matter of the mistake of fact defense, because it is

clear from the instruction given that Abbott could not have acted with the requisite knowledge or intent in order to be convicted of theft if he mistakenly believed the automobile was not stolen.

Abbott's second allegation of error contends that the trial court should have read to the jury Indiana Pattern Jury Instruction 12.,03, regarding the existence of a confession, instead of the trial court's final Instruction No. 11. Specifically, Abbott claims error results from the fact that the given instruction did not state to the jury, "It is for you to determine whether the Defendant confessed." Instead, the trial court's final Instruction No. 11 instructed the jury regarding "an oral statement which purports to be the voluntary admission of the defendant."

This allegation revolves around the trial testimony of Detective Sergeant Robert Copelin of the Dyer, Indiana Police Department. Detective Copelin testified that Curt Abbott

admitted to him that he knew the automobile was stolen. Abbott denied admitting any knowledge that the automobile was stolen. Abbott argues that there was a need for his tendered instruction regarding the existence of a confession because there was a question of fact as to whether an admission existed.[1]

The trial court's instruction regarding a "purported" admission properly leaves the question of fact as to whether the admission existed to the jury. This instruction, coupled with final Instruction No. 10 informing the jury that it was the exclusive judge of the evidence and the credibility of the witnesses, covered the same subject matter as Abbott's tendered instruction. The trial court thus committed no error in refusing Abbott's tendered instruction. See, Warren, supra.

Abbott's third allegation of error is that the trial court should have substituted Abbott's tendered Instruction No. 2 for the court's final Instruction No. 13. Both

instructions concerned the jury's potential use of admitted evidence regarding Abbott's prior conviction for theft. Abbott's tendered Instruction No. 2 reads:

> "The use of the defendant's prior conviction must be restricted by you solely to the purpose of determining his credibility. You must not consider said previous conviction at all in determining whether or not he has been proven guilty or is not guilty of the offense charged."

---

1 The trial court's instruction more correctly termed Abbott's alleged statement of knowledge that the automobile was stolen a possible "admission" rather than a "confession." A confession is the admission of guilt by the defendant of all the necessary elements of the crime of which he is charged. Worthington v. State (1980), Ind. App., 409 NE 2d 1261, 1271. Even if Abbott knew the automobile was stolen, the other elements of the crime of theft would have to be proven in order to convict him of the charged crime.

The final instruction No. 13 as given by the court reads:

> "Evidence has been admitted showing a prior conviction of criminal acts by the defendant. This testimony has been admitted for the purpose of impeachment and may be considered by you only on the question of his propensity to tell the truth."

Abbott contends that the trial court's final instruction does not specifically tell the jury not to consider the previous conviction when determining the question of guilt. Even though the court's final instruction does not instruct the jury in as straightforward a manner as Abbott's tendered instruction, it does adequately cover the subject matter of the limited use of the prior conviction. The trial court thus committed no error in refusing Abbott's tendered instruction. See, Warren, supra.

Abbott's fourth allegation of error is that the trial court erred in overruling his motion in limine requesting an order that no

mention be made of his previous conviction for theft. This issue has been waived. It is well settled that the overruling of a motion in limine is no error because error only occurs upon the admission of improper evidence. For this reason, an objection must be made at the time the evidence is offered in order to preserve any potential error in the denial of a motion in limine. Waters v. State (1981), 215 Ind. 182, 415 NE 2d 711, 713. No objection was made at the time Abbott's prior conviction was used to impeach his testimony.

Abbott's final allegation of error is that the evidence presented at trial was insufficient to sustain his conviction. Specifically, Abbott alleges that insufficient evidence was introduced to show that he knowingly and intentionally exerted unauthorized control of the motor vehicle of another person, as required by IND. CODE Section 35-43-4-2.5. However, the State introduced circumstantial evidence that Abbott knew the automobile was stolen, and a

conviction may be based on circumstantial evidence alone. Correll v. State (1985), Ind., 486 NE 2d 497, 500. This circumstantial evidence was reinforced by the direct testimony of Detective Copelin, who testified that Abbott admitted to him that he had knowledge that the automobile was stolen. Although there was conflicting evidence introduced by Abbott, assigning weight and credibility to the evidence was the province of the jury and its determination will not be disturbed by this Court.

The trial court is affirmed.

Affirmed.

GARRARD, P.J., and STATON, J., CONCUR.

CURT DOUGLAS ABBOTT VS. STATE OF INDIANA

You are hereby notified that the COURT OF APPEALS (sic) has on this day 9/24/87 APPELLANT'S PETITIN (sic) FOR TRANSFER IS HEREBY DENIED. RANDALL T. SHEPARD, CHIEF JUSTICE. ALL JUSTICES CONCUR.

(2)

Supreme Court, U.S.
FILED
DEC 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-951

IN THE

Supreme Court of the United States

October Term, 1987

CURT DOUGLAS ABBOTT,
Petitioner,
v.
STATE OF INDIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LINLEY E. PEARSON
Attorney General of Indiana
WILLIAM E. DAILY
Deputy Attorney General
AMY SCHAEFFER GOOD
Deputy Attorney General
Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6230
Attorneys for Respondent

Central Publishing Company, Inc., Indianapolis, IN 46206

14 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner was denied his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment and whether Petitioner was denied his Sixth Amendment right to a jury trial when the trial court failed to include two of Petitioner's proposed jury instructions.

II. Whether Petitioner was denied his Sixth Amendment right to counsel when the Petitioner volunteered statements following an admonition by the Petitioner's attorney to the police not to question the Petitioner.

TABLE OF CONTENTS

Page:

Questions Presented for Review i

Table of Authorities iii

Opinion Below 1

Statement of the Case 2

Summary of the Argument 3

Reasons for Denying the Writ:

I. PETITIONER FAILED TO PRESENT A FEDERAL QUESTION REGARDING THE REFUSAL OF TWO FINAL INSTRUCTIONS 3

II. THE ISSUE CONCERNING THE ADMISSIBILITY OF PETITIONER'S CUSTODIAL STATEMENTS IS NOT PROPERLY BEFORE THE UNITED STATES SUPREME COURT IN THAT PETITIONER DID NOT PRESENT THE QUESTION TO THE APPELLATE COURT OF INDIANA.... 7

Conclusion 9

TABLE OF AUTHORITIES

Cases: *Pages:*

Anderson v. State, Ind., 469 N.E.2d 1166 (1985) 7

Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969) 7

Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981) 4, 6

Cox v. State, Ind., 475 N.E.2d 664 (1985) 7

Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 441 (1968) 4, 6

Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) 4, 7

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 2, 8

Monks v. New Jersey, 398 U.S. 71, 90 S.Ct. 1563, 26 L.Ed.2d 54 (1970) 7

Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1986) 8

Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) 4, 6

Warren v. State, Ind., 470 N.E.2d 342 (1984) 4, 5, 6

Statutes:

Indiana Code 35-41-3-7 5

NO. 87-951

IN THE

Supreme Court of the United States

October Term, 1987

CURT DOUGLAS ABBOTT,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of Indiana, respectfully prays this Court to deny the issuance of a writ of certiorari directed to the Appellate Court of Indiana, thereby refusing to review the decision entered by the Court in Cause No. 45A03-8609-CR-259 on February 19, 1987.

OPINION BELOW

The Supreme Court of Indiana, without issuing an opinion, denied transfer on September 24, 1987 and this denial may be found at page 12a of Petitioner's Appendix. That denial had the

effect of letting stand the earlier memorandum decision of the Court of Appeals of Indiana which is not reported and may be found at page 1a of Petitioner's Appendix.

STATEMENT OF THE CASE

During the night of September 16, 1985, the 1983 Chevrolet Impala belonging to John Goulding was stolen from where it was parked outside his residence in Chicago, Illinois (R.169-170). The Cook County Sheriff's Department was alerted and Officer O'Dea located the vehicle parked on a street in Calumet City (R.176). A surveillance team was set up to watch and follow the vehicle (R.176-177). After about five hours, several people came out and got into three different vehicles, including the Impala, and drove off, with the Sheriff's deputies following (R.177-178). The Impala and also a Thunderbird stayed together and eventually ended up outside the Petitioner's residence at 1434 Greenwood Drive in Dyer, Indiana (R.178-179). The driver of the Impala went into the residence for a few minutes then came outside and waved to the driver of the Impala to drive it into the backyard (R.178-179). The Petitioner did inspect the Impala and saw that the driver's window was broken out and that the steering column had been broken, or "peeled," so as to expose the ignition wires (R.197, 269).

The Dyer Police Department was alerted to the scene by the Cook County Sheriff's deputies. They took control of the situation and took the Defendant and two other men into custody (R.183, 186). The Petitioner phoned his attorney from his home and the attorney advised him not to sign a statement (R.128). Officer Copelin advised the Petitioner of his *Miranda* rights and transported him the one or two miles to the police station (R.198). During the short journey, the Petitioner initiated conversation asking things like what was going to happen to him, stating that it was the first time he was involved in anything like this and also stating words to the effect that he knew the vehicle was stolen (R.198-200, 204-205). These volunteered statements made by the Petitioner were admitted at trial without any objection being interposed by the Petitioner

(R.198-200, 203-205). The admission of these oral statements into evidence was not presented as an issue on the Defendant's appeal of the conviction to the Appellate Court of Indiana (Petitioner's Appendix at pp. 1a-11a).

The Defendant was aware when the Impala was delivered to him that it was being delivered without the proper paperwork, *i.e.* no title (R.269). He maintained at trial he believed the vehicle was legitimate notwithstanding the fact it was delivered to him by a man with whom he had previously had dealings and knew of his dishonesty (regarding bounced checks), that the window was smashed and the steering column broken to permit "hot wiring" of the vehicle, and the vehicle was without its paperwork (R.269).

SUMMARY OF THE ARGUMENT

I. Petitioner has failed to show that the refusal of his two final instructions presents a federal question. In fact, the decision of the Appellate Court of Indiana on this issue was in accordance with Indiana precedent which provides that refusal of instructions is harmless where their substance is covered by others given by the court.

II. Petitioner did not raise Sixth Amendment "right to counsel" issues in the Appellate Court of Indiana and these issues should not be determined at this stage, since they were not "pressed or passed upon" below.

REASONS FOR DENYING THE WRIT

I.

PETITIONER FAILED TO PRESENT A FEDERAL QUESTION REGARDING THE REFUSAL OF TWO FINAL INSTRUCTIONS

Petitioner contends he was denied due process as guaranteed by the Fourteenth Amendment and was denied his Sixth Amendment right to a jury trial when the trial court failed to give two of Petitioner's requested final instructions. One of

these refused instructions concerned the defense of "mistake of fact" and the other one concerned the determination by the jury of whether the Petitioner had confessed. Respondent respectfully contends that Petitioner's issues here were determined by the Appellate Court of Indiana based on valid Indiana case law which holds that refusal of instructions is harmless where their subject matter is adequately covered by others given by the court. *Warren v. State*, Ind., 470 N.E.2d 342 (1984).

In fact, Petitioner's argument to the Appellate Court and Supreme Court of Indiana was based upon state-law interpretation of the necessity of giving certain instructions and he never alleged, until now, that a federal constitutional or statutory provision was violated by the trial court's refusal of the two instructions. Therefore, appellate jurisdiction must fail here. *See Illinois v. Gates*, *infra*.

It is Respondent's position that Petitioner's reliance in his Petition for Writ of Certiorari on *Taylor v. Kentucky*, *Carter v. Kentucky* and *Duncan v. Louisiana*[1] is misplaced in that these cases are clearly distinguishable from the facts of this case and are not controlling. *Taylor* concerns the refusal by the trial court to give an instruction on the "presumption of innocence" and no other instruction given could conceivably suffice to convey to the jury this undoubted, elementary and axiomatic principle of law the enforcement of which "lies at the very foundation of the administration of our criminal law." *Taylor*, 436 U.S. at 483, 98 S.Ct. at 1933. *Carter* concerned the trial court's refusal of an instruction which would have charged the jury it could make no adverse inference of any kind from the defendant's exercise of his privilege not to testify. This Court held that the Fifth Amendment right against self-incrimination and the further constitutional guarantee that "no adverse

---

[1] *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978); *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981); *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

inference" be drawn from the exercise of that right are so very basic to our Constitution, it is error to refuse such an instruction when one is properly tendered and no other instruction, *e.g.* one on the presumption of innocence, can take its place. In the case at bar, the instructions at issue concern the Indiana statutory defense of "mistake of fact" which is set out in Indiana Code 35-41-3-7,[2] and the jury's duty to determine whether the statements made by Petitioner constituted a "confession." These areas of law are not of such basic constitutional principles as to mandate the instructions proposed by Petitioner be given in the exact language as proposed by Petitioner. Other instructions given by the court in this case adequately covered the subject matter of these two instructions and sufficiently charged the jury with the law in order to enable them to render a valid verdict. As noted by the Appellate Court of Indiana in its memorandum decision in this case:

> However, the Supreme Court in *Warren* also determined that it was not reversible error for the trial court to refuse a tendered instruction when the subject matter of the instruction is covered by other instructions given by the court. 470 NE 2d at 344. In *Warren*, the trial court properly charged the jury with all of the elements for each crime involved, including a lack of consent element. 470 NE 2d at 344. Therefore no error was found in the trial court's refusal to give a tendered instruction specifically on lack of consent. 470 NE 2d 344. This *Warren* rationale controls the outcome of Abbott's allegation of error because the trial court here properly charged the jury with all of the elements of the crime of theft in its final Instruction No. 2. These elements include the requirements that Abbott acted "knowingly or intentionally" and "with intent to deprive" the rightful owner of the auto-

---

[2] I.C. 35-41-3-7 Mistake of fact

Sec. 7. It is a defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for commission of the offense.

> mobile's use. This instruction covers the subject matter of the mistake of fact defense, because it is clear from the instruction given that Abbott could not have acted with the requisite knowledge or intent in order to be convicted of theft if he mistakenly believed the automobile was not stolen.

(See Petitioner's Appendix, at pp. 5a-6a).

The Appellate Court of Indiana also properly determined that another instruction given by the court which stated in part "an oral statement which *purports* to be the voluntary admission of the defendant" coupled with the instruction that the jury was to be the exclusive judge of the evidence and the credibility of the witnesses, adequately covered the same subject as Petitioner's refused instruction on the determination by the juror's of whether the defendant had confessed. The court held:

> The trial court's instruction regarding a 'purported' admission properly leaves the question of fact as to whether the admission existed to the jury. This instruction, coupled with final Instruction No. 10 informing the jury that it was the exclusive judge of the evidence and the credibility of the witnesses, covered the same subject matter as Abbott's tendered instruction. The trial court thus committed no error in refusing Abbott's tendered instruction. *See, Warren, supra.*

(See Petitioner's Appendix, at p. 7a).

Petitioner's reliance on *Duncan, supra,* is even more misplaced than the previously discussed *Taylor* and *Carter* in that *Duncan* concerned a person charged with misdemeanor offenses right to a trial by jury. Petitioner here had a jury trial and that jury was properly charged with all the law necessary for it to render a valid verdict.

Respondent would add, in conclusion, that as argued by the Respondent in the Appellate Court of Indiana, Petitioner waived any error on appeal regarding the refusal of these instructions in that the record on appeal did not contain the instructions he allegedly tendered. The failure to tender

instructions in writing constitutes a waiver of the right to challenge on appeal a trial court's refusal to give the instructions to the jury. *Anderson v. State*, Ind., 469 N.E.2d 1166 (1985); *Cox v. State*, Ind., 475 N.E.2d 664 (1985). Petitioner's failure here to tender these instructions or, if the record on appeal was simply not complete, his failure to provide an adequate and complete record on appeal had waived the issue with respect to these instructions.

The Appellate Court of Indiana in all respects acted properly in deciding these instructions issues against Petitioner and in no way was Petitioner deprived of a fair trial, due process or of a jury trial.

II.

THE ISSUE CONCERNING THE ADMISSIBILITY OF PETITIONER'S CUSTODIAL STATEMENTS IS NOT PROPERLY BEFORE THE UNITED STATES SUPREME COURT IN THAT PETITIONER DID NOT PRESENT THE QUESTION TO THE APPELLATE COURT OF INDIANA

Petitioner contends his custodial statements made to the police should not have been admitted into evidence by the trial court. Although Petitioner had made a pre-trial motion to suppress his statements, he never objected to the admission of the statements at trial, and never raised the issue of their admissibility on appeal to the Appellate Courts of Indiana. The Respondent therefore respectfully contends that Petitioner has made no federal claim and his Petition for Writ of Certiorari must be denied either on the basis of failure of jurisdiction or for failing to meet this court's prudential requirement that a federal basis exist that was pressed and passed upon below. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969); *Monks v. New Jersey*, 398 U.S. 71, 90 S.Ct. 1563, 26 L.Ed.2d 54 (1970). The so-called "not pressed or passed upon below" rule was recently restated in *Illinois v. Gates*: Due regard for the appropriate relationship of this Court to state

courts demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials. 462 U.S. at 221, 103 S.Ct. at 2323. Petitioner did not press this claim of denial of right to counsel as prohibiting the admissibility of his custodial statements, nor, consequently, have the courts of Indiana, passed upon it. Therefore, this Court should decline to consider relief on this basis.

In addition, Respondent would respectfully maintain the record does show Petitioner's custodial statements were made voluntarily to the police and were not the result of any interrogation. Any statement made by an accused freely, voluntarily, and without any compelling influence is admissible into evidence.

> The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Id.*, at 478, 86 S.Ct., at 1630.

Rhode Island v. Innis, 446 U.S. 291 at 301, 100 S.Ct. 1682 at 1689, 64 L.Ed.2d 297 (1986), quoting from *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Petitioner here had been read his *Miranda* rights and been warned by his attorney to make no or to sign no statements. In the squad car on the way to the station house, Petitioner volunteered statements concerning what was to happen to him, that this was the first time anything like this had happened to him and that he knew the Impala had been stolen (R.198-200, 204-205). These volunteered statements do not come under the protection of the United States Constitution.

CONCLUSION

For the foregoing reasons, the Respondent, State of Indiana, respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

WILLIAM E. DAILY
Deputy Attorney General

AMY SCHAEFFER GOOD
Deputy Attorney General

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6230

Attorneys for Respondent